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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. United's brief *completely abandons* the rationale of the decision of the Court of Appeals on the issue of statute of limitations and instead reverts to the reasoning of the decision of the district court, upon which the Court of Appeals refused to pass. United thereby acknowledges by its silence the errors of the Court of Appeals cited in the petition. (United contends in its cross petition, No. 1320, that the Court of Appeals also erred on the issue of *res judicata;* our separate brief in opposition shows that the cross petition is without substance.)

United does not contest petitioner IRCA's contention that the undisputed record evidence establishes that United dominated six out of the nine IRCA directors from May 1959 through at least February 16, 1961 (Petition 18-19).

Moreover, United reaffirms its concession that the degree of domination found in *Ripley* would have been sufficient "*to prevent Railways from bringing an* [*antitrust*] *action in its own name*" against United even after the election of three independent directors in 1959 (U.F. Br. 17-18).* Therefore United and IRCA both agree that the Court of Appeals below was in error as to the record and that the undisputed record evidence (Petition 18-19) is as follows:

> (i) defendant dominated a majority of plaintiff's directors during the period May 1959-February 1961 (Petition 18-19);
>
> (ii) a demand on the plaintiff to sue defendant would have been a "useless and futile act" (Petition 18; App. 32a; U. F. Br. 17-18);
>
> (iii) defendant's domination of IRCA would have been sufficient "to prevent Railways from bringing an [antitrust] action in its own name [against United]" (Petition 18-19; U. F. Br. 17-18).

Since the U. S. Court of Appeals itself held that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" (App. 14a), and in light of the above, the Court of Appeals clearly erred in holding (App. 15a):

> "we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder

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* United's belated attempt to restrict its concession to ante-1959, by stating that it was based on the trial record in *Ripley* that was closed on January 4, 1956, is fully answered by the language of its concession in two separate sentences: "concede for present purposes" (U.F. Br. 17). That language demonstrates that United was conceding the *continuation* of that same degree of domination, found in *Ripley*, to the period between May 1959 and February 1961.

or director would necessarily have been fruitless." (See Petition, pp. 15-25.)

United in no way attempts to support that critical holding of the Court of Appeals.

Nor does United negate our contention that the U. S. Court of Appeals drew inferences, made assumptions and argued possibilities *in favor of defendant, the moving party,* on its motion for summary judgment, contrary to the decision of this Court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, requiring the court to "look at the record on summary judgment *in the light* most favorable to [plaintiff], the party *opposing* the motion." *Accord: U. S.* v. *Diebold, Inc.,* 369 U. S. 654, 655 (civil antitrust).

United also fails to dispute the general rules that federal statutes of limitations are tolled where plaintiff "has been prevented from asserting" its claims, *Burnett* v. *N. Y. Cent. R. Co.,* 380 U. S. 424, 429, and that "the maxim that no man may take advantage of his own wrong" bars "inequitable reliance" on federal statutes of limitations, *Glus* v. *Bklyn. East. Dist. Term.,* 359 U. S. 231, 232-3).*

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* United misses the main thrust of *Glus.* There the estoppel to plead the statute of limitations was based on an unintentional misstatement by defendant which induced the plaintiff to delay commencement of his action. Our case is a much stronger one for estoppel: United prevented IRCA from bringing suit against it by its wrongful domination over IRCA's management. Moreover, United, in discussing *Glus,* deliberately begs the question by its *ipse dixit* that *"plaintiff,* its directors and its stockholders, for the reasons stated above, all had ample opportunity to initiate this action within the period of the statute of limitations" (21). Indeed, United never did state the reason why *plaintiff* had the opportunity to institute this action within the tolled period; *contra* United's position at page 21, United concedes elsewhere (18) that its domination over IRCA through February 1961 was "sufficient to prevent Railways from bringing an [antitrust] action in its own name" against United.

United and IRCA both agree that the question of law before this Court, is whether the *mere possibility* of a *derivative* suit on behalf of IRCA, by an informed minority director or a stockholder, defeats tolling of the statute where United, by its domination of a majority of IRCA directors, prevented IRCA itself from asserting its antitrust claims against United. The Court of Appeals* refused to pass upon that question (App. 16a):

> "We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to 'domination' of a corporation by the alleged wrongdoer."**

2. We show hereinbelow the error of the district court's decision, now United's sole reliance. *Curtis* v. *Connly*, 257

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* United's *ipse dixit* that the Court of Appeals' decision was based on "settled principle" (14), "established legal principle" (18), "general principles . . . well estabished" (20), and "presents no novel questions" (20) is not only inconsistent with its complete failure to attempt to support that decision but is absurd in light of the Court of Appeals' appraisal of the issue: "vexing problem" (App. 9a), "more difficult question" (App. 16a), "precedents in this court . . . do not assist decision" (App. 11a), and "other federal decisions going in various directions" (App. 12a).

** The Court of Appeals was not holding that plaintiff had to establish that each and every director was dominated, otherwise it would not have left unanswered the question of whether an informed independent minority director defeats tolling. That being so, the Court of Appeals' determination, cited by United, that "UF's control of IRCA thus was no longer 'full, complete and exclusive' *in the sense here relevant*" (App. 15a-16a) did not require domination of *all* IRCA directors. That quote followed the discussions about, and must have related to, the six directors, who, the Court of Appeals erroneously speculated might have been, upon demand, induced to sue even though *"the odds may have been against the likelihood"* (App. 14a) of an antitrust action against United and even though United conceded that a demand was a "useless and futile act" (Petition 18).

U. S. 260, was the only case cited by the district court on limitations (I-19a), and the Court of Appeals showed clearly why it does not apply.*

Moreover, United has misinterpreted *Curtis* and the cases which follow it (U.F. Br. 15-17). United ignores the following language of the Supreme Court (*Curtis*, 257 U. S., at 264):

> "It is said that they [the defendant directors] stood in a fiduciary relation to the bank. *But they were strangers to it when they left the board, more than six years before this suit was brought.*" (Italics supplied)

Thus, the statute started to run as to each director when *he terminated his fiduciary relation to the bank.* Applying this to our case, the statute began to run from 1962 because only then did United terminate its management control over, and fiduciary relation toward, IRCA.

United cites *Payne* v. *Ostrus*, 50 F. 2d 1039 (C. A., 8), but ignores both its holding and its interpretation of *Curtis*.

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* *Viz.* (i) *Curtis* was governed "by the Rhode Island statute of limitations"; (ii) that statute had an express tolling provision but only for fraudulent concealment of the cause of action; (iii) the Supreme Court's opinion did *not* discuss the question whether the statute was tolled until the bank passed into the hands of a majority of innocent directors; (iv) appellant's briefs in the Supreme Court "went *not to domination* as such but rather to knowledge"; (v) "Although the domination issue thus was raised by the facts, *the Supreme Court seems not truly to have focused upon it*"; and (vi) "we do not consider it nearly so conclusive in defendant's favor *as did the district judge*" (App. 10a-11a). The district court also held (I-17a) that "if 'practical control' of the type found in *Ripley* is enough to toll the statute of limitations, *we are compelled by the doctrine of collateral estoppel to decide this issue in plaintiff's favor.*" Once *Curtis* is knocked out, then, in light of United's concession (17-18) that the degree of "domination" found in *Ripley* was "sufficient to prevent Railways from bringing an action in its own name", was not the court "compelled" to decide the tolling issue for plaintiff?

Like *Curtis, Payne* was an action against directors individually. The Court held as follows (at 1043):

> "The fiduciary relation between a bank and its directors ceases when they leave the board. *Curtis* v. *Connly.*"

Accordingly, the court held that the statute of limitations began to run in favor of each director from the date of his resignation from the board.

Michelsen v. *Penney*, 135 F. 2d 409, 416, n. 2 (C. A. 2), cited by United, is inapplicable since it was, also, a concealment (App. 11a) case involving the local tolling rule. It cited cases both ways but did not find it necessary to resolve the issue because of the control of all the directors. *Contra* United's "well-established law", the Court of Appeals held: "While the parties have cited many other federal decisions *going in various directions*, we see little to be gained by detailed analysis of them" (12a-13a). Thus, the *McNair, Farmer* and *Anderson* cases, cited by United, are also not helpful for the reasons stated above.

United (16-17) quoted incompletely from *White* v. *Fed. Dep. Ins. Corp.*, 122 F. 2d 770, 775. The court held that tolling of limitations under the Virginia statute, for concealment, continues during adverse domination of a majority of the board of the bank unless *all* parties affected thereby have knowledge of the wrong and *full power to pursue a remedy*. In that case, the full power included the vast combined resources in money and legal talent of the U. S. Comptroller of the Currency and the Federal Deposit Insurance Corporation, duty bound to institute, and powerful enough to pursue, the necessary legal proceedings.

Plainly, under that test, tolling of the statute of limitations continued on the antitrust claims of IRCA against United until at least May 1961. No financial resources and legal talent were available to IRCA to vindicate its federal

rights. With the majority of the IRCA Board in United's pocket, IRCA was itself disabled from suing and its treasury and legal staff were effectively tied up by United's adverse control. Even if some stockholder volunteered to bring a stockholder's action after he learned of the antitrust violations, where would he get the financial sinews and lawyers to wage the bitter war? The *Ripley* action then pending in the State courts, in the course of which the antitrust violations first came to light, was being relentlessly contested by United with the combined treasuries of, and the heaviest legal batteries of New York City engaged by, both United and IRCA. That was enough to scare off the hardiest stockholders, directors, experts and lawyers. The *Ripley* action was not completed until 1961. Only thereafter were the stockholders' lawyers paid for work going back to 1949 and to fix the amount of their fee they had to fight United and IRCA, again, without compensation for all that extra effort. The *Ripley* lawyers had learned the costly lesson United had deliberately taught them: no more stockholder actions against United! IRCA brought the present action less than four years after the successful completion of *Ripley* and very shortly after it engaged its present lawyers who, until January 1963, were engaged in litigation against IRCA and United for their fee in the *Ripley* matter. Moreover, the second condition necessary to end tolling was not met, *viz.* knowledge by *all* the IRCA stockholders of the antitrust violations. United obviously has not shown, and cannot show, the requisite ample knowledge of the material facts by *all* the thousands of IRCA stockholders affected, *contra* United's assertion (16), without a record reference.

Allen v. *Wilkerson,* 396 S. W. 2d 493 (Tex. Civ. App., 1965) (application for writ of error refused; no reversible error), is squarely in point. With respect to a cause of action by a corporation against a director, the court expressly rejected the argument that tolling ended when

one stockholder-director was in a position to sue on behalf of the corporation (*id.*, at 501). The court stated as follows:

> "And where, as here, the management of a corporation's affairs are de facto under the domination and control of the adversary of such cause of action, or the corporation is de facto powerless to sue on such cause of action because of a lack of a disinterested majority of its board, mere notice to shareholders does not start running of limitations against the corporate cause of action" (*id.*, at 502).

Accord: *Rankin* v. *Cooper,* 149 Fed. 1010, 1015-1016 (W. D. Ark.); *Natl. Bank of Com.* v. *Wade,* 84 Fed. 10, 15-16 (D. Wash.).

The opinion of the district court is predicated on the doubly untenable hypothesis that if a stockholder does not bring a derivative action he is guilty of laches and that such laches is attributable to the corporation. The law is clearly otherwise. So in *Whitten* v. *Dabney,* 171 Cal. 621, 154 Pac. 312, the court held that:

> "It is in no sense his [a stockholder's] duty to sue."

and, accordingly, that notice to stockholders is immaterial (p. 629). The court observed in this connection that the stockholder necessarily "gives consideration to the time, trouble and expense of the litigation and the loss in which he would be involved if he failed to prevail" (*id.*). Such considerations cannot result in the loss of the corporation's right to sue, once freed of the wrongdoer's domination; during that domination,

> "the statute of limitations does not run against it. It is like the minority of an infant." (*id.,* 629)

Accord: 13 Fletcher Cyc. Corp. Perm. Ed. § 5886, p. 306: discovery of the wrong by a stockholder does not

bar the corporation "so long as it is under disability to sue by reason of the delinquents' control"; also § 5874, p. 283.

A very pertinent case cited by Fletcher in this connection is *Liken* v. *Shaffer,* 64 F. Supp. 432, 442.*

The statute is tolled because the corporation, by virtue of the wrongdoer's domination, is unable to sue it or prosecute the action effectively and in good faith. The district court's decision that the corporation has lost its federal rights because of a stockholder's failure to enforce them, is inconsistent with *Gottesman* v. *General Motors,* 268 F. 2d 194, 197 (C. A. 2). There the Court held that an antitrust violation by DuPont injuring General Motors, a corporation under its control,

> "can in no way be ratified or rectified by a vote of the shareholders of General Motors."

United seeks to rely on a stockholder "ratification or rectification" of its antitrust wrongs, through a mere omission by IRCA stockholders to bring a derivative stockholder's action to redress those wrongs. This it cannot do

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* "In an ordinary action by a corporation on a claim, the conduct of a particular stockholder is not material. Stockholders have no power to act for a corporation except at a corporate meeting . . . where a claim is asserted in behalf of a corporation in a stockholder's derivative action in order for matters to be a bar to the claim, they must be such matters as relate to the corporation itself, and the conduct of a particular stockholder is not material . . . Acquiescence of a stockholder in the wrong complained of, which prevents him from maintaining a stockholder's derivative suit, is distinct from the acquiescence on the part of a corporation which is a bar to the claim . . . *However, the claim of the corporation cannot be barred by the conduct or situation of the particular stockholder or stockholders instituting the proceedings* . . ." (italics supplied)

under *Gottesman, supra. Accord: Rogers* v. *American Can Co.*, 305 F. 2d 297 (C. A. 3).*

The decision of the district court also overlooks basic principles of corporation law.

> "The corporation (as distinguished from its shareholders) is vested with the primary rights, legal or equitable or both, to redress wrongs committed against it." 2 Hornstein, Corporation Law & Practice § 711, pp. 190-1.

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* There, the court refused to dismiss an action for treble damages even though a majority of the stockholders, independent of the wrongdoer, voted against bringing the action. The Court held as follows, quoting the lower Court's opinion with approval:

> "Thus any attempt by corporate stockholders *by vote or otherwise*, to ratify such illegal acts in the past . . . would be a nullity. . . .
>
> "Since the vote is a nullity, *obviously it cannot bar a suit by the injured corporation*, . . . to obtain relief." (316; italics supplied)

IRCA's stockholders' omission to bring a derivative action to enforce IRCA's rights against United for violation of the antitrust laws is a "nullity", which "cannot bar a suit" by IRCA; "this is especially so" insofar as the action is based "on Federal antitrust law . . . These laws express an important nationwide public policy. Obviously, it is unlawful to violate them. It would seem equally obvious that it would be legally impossible to ratify their violation" (*id.*, 316).

> "It would be unthinkable to allow the ratification of violations of Federal law to serve as a bar to a suit for redress of the injuries sustained thereby where Congress by specific enactments has provided for such redress as a matter of public policy." (*Id.*, 317)

A fortiori, it would be unthinkable to allow a mere omission to work the same legal impossibility, by taking away the very tolling which is intended to keep alive the corporation's right to enforce those antitrust laws by private action, as a matter of Congressional policy.

"The separate entity is the rule, not the exception."* *Id.*, § 751, p. 262.

A plaintiff corporation can, at some stages without, and at any stage with, its opponent's consent, dismiss an action without the approval of the court. F.R.C.P. § 41(a)(1). Not so, in the case of the derivative action. F.R.C.P. § 23(c). Again, the plaintiff corporation can compromise the suit, at any stage, without giving any stockholders notice thereof and opportunity to be heard thereon. Cf. F.R.C.P. § 41(a)(1). Not so, as to the derivative action. Settlement of such an action requires notice and hearing to all stockholders. F.R.C.P. § 23(c). Thus, United now seeks to bind IRCA as to its causes of action, because not asserted—and at least in part not assertable—in its behalf by certain individual stockholders or minority directors, even though such stockholders and directors could not have bound IRCA as to such causes of action, by dismissal or compromise, had they actually brought derivative suit thereon. This is an additional anomaly embedded in the decision of the district court.

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* *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 202 F. 2d 731, 734 (C. A. 2), sustaining the right to bring a derivative stockholders' action, stated:

> *"Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs.* * * * The cause of action which such a plaintiff brings before the court is not his own but the corporation's. It is the real party in interest and *he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself."* (Italics supplied)

The district court's decision whose rationale the Court of Appeals refused to affirm, takes the untenable position that because a "next friend" may sue for an individual during the latter's disability, the latter may not sue when the disability is removed.

3. United and the district court, in relying on the fact that the *Ripley* trial record exposed antitrust violations, has confused two exceptions; *viz.*, those based, respectively, on concealment and on domination. Only the former, not the latter, is dissolved by publication of the facts underlying the cause of action. The measure of the period tolled is governed by the reason for the tolling. Where "concealment" is the reason, plainly discovery of the facts ends the suspension. But where, as here, "adverse domination" is the reason, the tolling must continue while the adverse domination lasts, regardless of whether the wrong becomes notorious.*

4. The district court found "There can be no doubt that United controlled IRCA at least through 1961" (254 F. Supp., at 239). It is therefore immaterial that IRCA counsel in the *Ripley* lawsuit, *after* a favorable trial court

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* See 63 Harv. L. Rev. 1177, 1219 "the period [of limitations] begins with the termination of the influence or duress". *Accord:* 34 Am. Jur., *Lim. of Actions*, § 413, p. 325: "The fact that the *plaintiff* has been prevented by the defendant from commencing action within the period of limitations operates to estop the defendant from pleading the statute of limitations". (Italics supplied)

United, in its Statement of Case, makes reference to facts concerning its argument on *res judicata* (6-7), knowledge of the stockholders or their lawyers concerning United's antitrust violations (7 through 11)—even though United concedes (7) "no question of tolling by reason of fraudulent concealment is here involved," and knowledge of IRCA's minority directors after 1959 (12 through 13). All of the above are immaterial on the issue of whether United's domination over IRCA prevented IRCA from asserting its antitrust claims against United and thereby tolled the limitations statute. *Henis* v. *Compania Agricola*, 210 F. 2d 950 (C. A. 3) *aff'g* on one ground only 116 F. Supp. 223, cited by United (12), has nothing to do with the issue. The Court of Appeals there held merely that the two plaintiff stockholders of IRCA in that case, who had bought their stock *in 1951*, had shown no legal capacity under Federal Rule of Civil Procedure (now) 23.1 to bring any action in behalf of IRCA to compel the restoration of stock and notes sold by IRCA *in 1936*.

decision for its benefit, were permitted to support the *Ripley* plaintiffs' request for higher damages on appeal. Indeed, United in the state court argued that that belated position of IRCA's counsel showed that IRCA was independent of United's domination; but the state courts rejected the contention and awarded damages based on said domination for a period beyond the date IRCA counsel took that position. IRCA counsel's only other alternative, on the appeal, was to take the position that IRCA should be *denied* the multimillion dollar recovery awarded by the trial court. That position would have exposed each IRCA director to suit for waste. The suggestion that IRCA would have sued United for half a billion dollars while "United controlled IRCA : . . through 1961", as pervasively and thoroughly as is shown by the facts found in *Ripley* and not contested here, is preposterous. Moreover, United admits that its domination over IRCA was "sufficient to prevent Railways from bringing an action in its own name" (18). In addition, the Chairman of the IRCA board was the general attorney for United.

United's *non sequitur* is that because IRCA supported the stockholders' position on appeal in *Ripley,* it would have filed a suit on the antitrust claims here presented. That argument loses sight of the fact that each director of IRCA as well as IRCA's counsel (for 30 years) would have likewise been prospective defendants in such an antitrust suit brought by IRCA. Such directors were not going to sue themselves in order to sue United. Therefore, United's suggestion that there were "manifestations of the independence of Railways' board" (13) in its support of the stockholders' appeal in *Ripley,* is far-fetched.

United contends (14, 19) in this connection that the Court of Appeals affirmed the district court's erroneous finding that IRCA "had the ability to and did in fact sue United." Examination of the Court of Appeals' opinion relied upon by United (at p. 19 of United's Br.) fails to support it.

Moreover, the district court's sole reliance for that finding must have been IRCA's support of the stockholders' appeal, which destroys the value of that finding.

5. The recent amendment to Rule 56(e) cited by United (20), requiring an adverse party to a motion for summary judgment to set forth in answering papers specific facts showing there are genuine issues for trial, has been fully complied with by petitioner on the issue of United's domination of a majority of IRCA directors (Petition 18-19). United fails to rebut that fact.

New Rule 56(e) is, moreover, helpful to petitioner on petitioner's motion for summary judgment (I-178a-250a), since United *completley failed* to file any affidavit in opposition to petitioner's motion. Accordingly, since it did "not so respond, summary judgment, if appropriate, shall be entered against [it]". Rule 56(e). It is appropriate here (Petition 26-28).

CONCLUSION

For the reasons stated in the petition, reinforced here, IRCA's petition for a writ of certiorari should be granted.

Dated: New York, New York, May 9, 1967.

Respectfully submitted,

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